

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.14 OF 2005

Shanaz D'Souza
Aged 26 years
R/o H.No.37
Bencleavaddo
Cuncolim, Goa
Represented by
Power of Attorney
Shri Arecio D'Souza.

... Appellant

versus

1. Sheikh Ameer Saheeb
Aged 52 years
R/o. near Vaikunth
Desai residency
Shantinagar, Navelim,
Salcete-Goa.

2. State
Through P.P.

... Respondents

Mr. C. A. Coutinho, Advocate for the Appellant.

Mr. S. S. Kakodkar, Advocate for the Respondent No.1.

Ms. Winnie Coutinho, Public Prosecutor for the Respondent
No.2.

CORAM : N. A. BRITTO, J.

DATE : 19TH OCTOBER, 2006.

ORAL JUDGMENT

This is complainant's appeal filed against the acquittal of the accused, under Section 138 of the Negotiable Instruments Act, 1881 (Act, for short) by Order dated 30-12-2004 of the learned Chief Judicial Magistrate, Margao.

2. The case of the complainant, in brief, was that the accused had borrowed from the complainant on 1-6-2002 a sum of Rs.2,00,000/- payable within a period of six months and the accused having failed to make the payment in cash, issued two cheques, the first dated 4-11-2002 and the second dated 5-11-2002, each for a sum of Rs.1,00,000/-, drawn on Vysya Bank Ltd., Margao but when the complainant presented the said cheques through Corporation Bank, Murida Branch, both the cheques were returned dishonoured vide Memo dated 13-11-2002 on the ground that the funds were insufficient. The complainant by statutory notice dated 25-11-2002 called upon the accused to pay the said amount of Rs.2,00,000/- covered by

the said cheques within a period of fifteen days and as the accused failed to comply with the same, the complainant filed the complaint on 31-12-2002 and after the statement on oath of the complainant in person was taken on 12-3-2003, the learned Magistrate was pleased to issue process against the accused for the said offence. However, during the course of the trial, it is the father and special attorney of the complainant who was examined in support of the said complaint.

3. The case of the accused, as reflected from the cross-examination of the complainant/Attorney was that the said cheques were signed by him and were kept to be given to trawler owners from whom he would purchase the fish but they were misplaced and the complainant managed to put his name on the said cheques and has tried to extract the amount from the accused. However, the said plea put forward to the complainant was not even translated by the accused in his own words when the accused was examined under Section 313 of the Code of Criminal Procedure, 1973. The accused also did not examine any witness in his said defence.

4. The learned Chief Judicial Magistrate has come to the conclusion that the said cheques were given much earlier than the dates mentioned therein forgetting that Section 118(B) carried a presumption that every negotiable instrument bearing the date was made or drawn on the date mentioned therein and again forgetting that it was for the accused to prove that the said cheque was not issued on the date which appeared on the face of the said cheque. The learned C.J.M. has also held that the complainant who had given a loan to the accused was not examined without demonstrating as to why his examination was absolutely necessary for the complainant to prove the case. The learned C.J.M. also came to the conclusion that the complainant had failed to prove that the accused had issued the cheques to the complainant when the plea taken by the accused that the cheques were misplaced by him had remained in the realm of suggestions only and the accused had failed to prove the same by leading evidence as to under what circumstances the said cheques came to be issued by the accused to the complainant. The learned C.J.M. also acquitted the accused by observing that the presumption that the cheques were issued towards a legally enforceable debt under Section 138 of the Act could be inferred

only if it was proved beyond reasonable doubt that the accused had issued the cheques to the complainant which the complainant had failed to prove that the accused had issued both the said cheques to the complainant. The accused having failed to prove that he had misplaced the said cheques, as suggested to the complainant, in the course of cross-examination, the only inference which was possible to be drawn was that the cheques were issued to the complainant, as claimed by the complainant in the complaint and subsequently in his evidence before the Court.

5. As far as the appellate powers of this Court are concerned, the learned Counsel Mr. S. S. Kakodkar has placed reliance on the case of **C. Antony v. K. G. Raghavan** (AIR 2003 SC 182). It is well settled that the powers of this Court hearing an appeal against acquittal are not different from the powers, while hearing an appeal against conviction. This Court has full power to review at large the evidence upon which the order of acquittal is founded and to reach a conclusion that upon that evidence, the order of acquittal should be reversed. It is well to remember that the paramount consideration of the

Court is to ensure that justice is done and miscarriage of justice is prevented. Acquittal of the guilty and the conviction of the innocent are both required to be avoided. The Court is only required to bear in mind that with the acquittal the initial presumption of innocence of the accused gets fortified by the acquittal and not weakened and if two conclusions are possible based on the evidence produced before the Court then this Court will decline to interfere and substitute its own view with that of the trial Court but if the view taken by trial Court is unreasonable, and, which I have already demonstrated herein above that it is, then it becomes the paramount duty of this Court to set aside the acquittal.

6. The controversy raised in this appeal is by and large in relation to the fact that the complainant was not examined in person but he was examined through his special Attorney.

7. It is now well settled, as held in the case of **Shambhu Dutt Shastri v. State of Rajasthan**((1986) 2 WLN 713) that:

"when a general power of attorney holder can appear, plead and act on behalf of the party, but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff".

8. The above view was followed in **Ram Prasad v. Hari Narain and others**(AIR 1998 Rajasthan 185) and by this Court in **Mamtadevi w/o Prafullakumar Bhansali v. Pushpadevi w/o Kailashkumar Agrawal and another** (2005 ALL MR(Cri) 3075) by observing that "Attorney Holder can act, appear and plead on behalf of a party and he can be a witness on behalf of the party".

9. The view of the Rajasthan High Court has also been accepted by the Apex Court in the case of **Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others**(AIR 2005 SC 439), in para 21 of the learned Judgment. In

Mamtadevi w/o Prafullakumar Bhansali v. Pushpadevi w/o Kailashkumar Agrawal and another(supra), this Court has again reiterated that (1) filing of complaint by such person through power of attorney would be perfectly legal and competent, (ii) that the complainant alone being a witness of transaction has himself to depose in support of complaint either at the stage of issuance of process or whenever; (iii) if the transactions are witnessed by the power of attorney himself as an agent of the payee, such power of attorney alone can be a witness and his being a power of attorney cannot disentitle him from being a witness; (iv) when the transactions are witnessed by the complainant and power of attorney or any other witness or witnesses in the whole or in part, all such persons will have to be the witness of the case, and the power of attorney shall not be disentitled from being examined as witness just because he holds a power of attorney. Again, this Court in **M/s. G. J. Packaging Private Ltd. and another v. M/s. S. S. Sales and another**(2006 CRI.L.J. 214) has reiterated the position by stating that the conspectus of judicial opinion, therefore, establish a principle that complaint in respect of offence punishable under Section 138 of the Act need not be personally

filed by the payee or holder in due course. It can be filed by power of attorney of the payee. Where the complainant is a juridical person it can be represented by a natural person to act as a de facto complainant. Where a power of attorney has full knowledge of the transaction, his statement can be recorded by the Magistrate for verification of the complaint, for ascertaining the truth of the allegations and to enable him to take a proper decision as to whether the process has to be issued or not. Even if the complaint is signed by a person, who is not properly authorized this defect can be subsequently rectified. The complaint cannot be quashed merely on this ground. Earlier, this Court in the case of **Dr. Pradeep Mohanbay v. Mr. Minguel Carlos Dias**(2000(2) ALL MR 664) had held that the complainant could appoint a power of attorney for filing the complaint in view of Section 142 of the Act. However, neither the Code of Criminal Procedure nor the Act contemplated that any one can depose for and on behalf of the complainant. In such complaint, the power of attorney is entitled to appear as a witness and depose in respect of facts which are within his knowledge and on the basis of record on which reliance is placed (Emphasis supplied). The Court also observed that in that case

no objection was taken when the power of attorney was examined and therefore the deposition of the power of attorney could be taken into consideration as a witness.

10. Now, a Full Bench of Andhra Pradesh High Court in **K. Ramachandra Rao and others v. State of A.P.**(2005(4)ALL MR(JOURNAL) 280 has recognized that the principle "Qui facit per alium facit per se" can be followed in prosecution for offences under Section 138 of the Act by filing a complaint through power of attorney as the said principle does not fall within the three exceptions recognized under Section 183 of the Contract Act and has reiterated the principle that a power of attorney of a payee or a holder in due course of a dishonoured cheque can file a complaint for an offence under Section 138 of the Act. Although the Full Bench has also stated that permission of the Court is to be obtained either before or after filing of the complaint, this view does not find support of any legal provision and does not appear to be in tune with any of the Judgments of this Court referred to herein above, and, therefore, with respect, need not be followed.

11. There is no dispute that the Act has created several presumptions in favour of a complaint in a prosecution under Section 138 of the Act. The first is under Section 118 itself and the next is under Sections 138 and 139 of the Act. As regards the said presumptions the Apex Court, speaking through three learned Judges in **Hiten P. Dalal v. Bratindranath Banerjee** ((2001) 6 SCC 16) and referring to Sections 138 and 139 of the Act observed that it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption has been established. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact. The Apex Court further observed that the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man.

12. Again, the Apex Court in the case of **K. N. Beena v. Muniyappan and another**((2001) 8 SCC 458) has observed that under Section 118, unless the contrary was proved, it is to be presumed that the negotiable instrument including a cheque had been made or drawn for consideration. Under Section 139, the Court has to presume, unless the contrary is proved, that the holder of the cheque received the cheque for discharge, in whole or in part of a debt or liability. In any complaints under Section 138, the Court has to presume that the cheque had been issued for a debt or liability. This presumption is rebuttable but the burden of proving that the cheque had not been issued for a debt or liability is on the accused. The Apex Court again noted that the accused has to prove at the trial by leading cogent evidence that there was no debt or liability, and, on the facts of that case the Supreme Court observed that the accused not having led any evidence could not be said to have discharged the burden cast on him. As observed by this Court in **Santan Finances and Real Estate v. Devappa**((2005(1) GLR 390) "there can be no dispute that the said presumption available under Section 139 of the Act in favour of the complainant is a rebuttable presumption. However, that presumption could not be rebutted only by way of

suggestions or a statement given by the accused under Section 313 of the Code. The presumption could be rebutted either by the accused leading evidence or bringing facts on record in cross-examination of the complainant which could make the case of the complainant improbable that the cheque was issued in discharge of any debt or other liability or through other documents produced and proved through the complainant".

13. At this stage, two other Judgments relied on behalf of the complainant may be referred to. The first is in the case of **T. H. Abdul Rehman v. T. E. Bharamchari**(1948 BLR 219). The said Judgment was delivered with reference to Section 118(a) of the Act and at a time when Section 139 was not in the Act. A Division Bench of this Court in the aforesaid case observed that in order to determine whether the contrary is proved or not, as required by Section 118, the whole volume of the evidence led before the Court must be considered. Very often important admissions are elicited by counsel for the defendant by cross-examining the plaintiff and those admissions certainly can be availed of by the defendant. But in considering the whole volume of evidence the Court must always bear in mind the statutory

presumption under Section 118 and also the fact that the burden of proof lies upon the defendant and that burden has got to be discharged by the defendant. How that burden can be discharged or whether it has been discharged is a matter of appreciation of evidence. The learned Division Bench further observed that it was not necessary for the plaintiff to prove any consideration. The presumption under Section 118 continued in all its rigour. Assuming that the plaintiff did attempt to prove consideration, the mere fact that he failed to prove such consideration did not in any way relieve the defendant from his obligation in law to establish the contrary of the presumption raised by Section 118 of the Act. The Division Bench finally observed that the plaintiff having failed to prove that consideration passed and the defendant also having failed to prove that he did not get consideration, the presumption in favour of the plaintiff continued and the failure of the plaintiff was not sufficient to lead one to the conclusion that the presumption under Section 118 of the Act was rebutted. The second is the decision in the case of **Bratindranath Banerjee v. Hiten P. Dalal**((1994) 4 BCR 237) wherein this Court observed that "the presumption which the Court will have to make in all such cases is that there was

some debt or liability. In my view, the ratio of **T. H. Abdul Rehman v. T. E. Bharamchari**(supra) will apply with greater force in prosecutions under Section 138. It will be for the accused to prove the contrary that is to say that there is no debt or any liability. This of course unless the prosecution restricts itself to a particular liability". It has been stated on behalf of the complainant that the ratio of the Division Bench in the case of **T. H. Abdul Rehman v. T. E. Bharamchari**(supra) was followed in this case and this Judgment of the learned Single Judge was upheld by the learned three Judges of the Apex Court in **Hiten P. Dalal v. Bratindranath Banerjee**(supra).

14. All that takes us back to Section 139 of the Act which now provides that "it shall be presumed, unless the contrary is proved, that the holder of a cheque received a cheque of the nature referred to in Section 138 for the discharge, in whole or in part of any debt or other liability". In other words, the presumption is mandatory and there is no choice left with the Court and it is for the accused to prove to the contrary. The expressions "proved" and "disproved" have been defined in Section 3 of the Evidence Act and mean:

"Proved" - a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it exists.

"Disproved" - a fact is said to be disproved when after considering the matters before it the Court either believes that it does not exist, or considers its non existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it does not exist.

15. In other words, it is for the accused to prove that the cheque issued by the accused was without consideration or that it was not issued in whole or in part payment of a debt or other liability. The Apex Court in the case of **M.M.T.C. Ltd. v. Medchl Chemicals and Pharma(P) Ltd.** ((2002) 1 SCC 234) has specifically stated that there is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability and the burden of proving that there was no existing debt or liability was on the accused and this the accused has discharged in the trial. Again, the Apex Court in the

case of **Goa Plast(P) Ltd. v. Chico Ursula D'Souza**((2004) 2 SCC 235) has followed the same principle. It follows therefrom that the onus to prove to the contrary is on the accused. This onus is not as onerous as the general burden which is on the prosecution. There is no doubt that when the prosecution has to prove its case it has to prove the case by a higher standard of proof which we call as proof beyond reasonable doubt but when an accused is required to prove a certain fact the standard of proof required is not as high as that of the prosecution and he certainly can prove a fact, when the accused has to discharge the burden, by a lower standard which we call by balance of probabilities and when it is stated that the accused has to probablise his defence all that is meant is that he has to prove his plea on the anvil of balance of probabilities, like in a civil case. In other words, the accused has to discharge the said onus of proving to the contrary that the cheque was issued without consideration by preponderance of probabilities and it is in this context that the Apex Court in **Hiten P. Dalal v. Bratindranath Banerjee**(supra) observed that the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must

either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man. What degree of probability amounts to proof is an exercise particular to each case. The concept of probability and the degrees of it, cannot be obviously expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof on balance of probabilities. As is often said, forensic probability must, in the last analysis, rests on a robust common sense and ultimately on the trained intuition of the Magistrate. Although, the accused did not lead any evidence in rebuttal it does not mean that the accused could not take advantage of the cross-examination of the complainant in rebutting the said presumptions.

16. Admittedly, in the case at hand, the complainant's attorney was very much present when the loan amount of Rs.2,00,000/- was paid by the complainant to the accused and this is apart from the fact that it was to be presumed to have been paid when the accused gave the cheques. It is contended on behalf of the accused, that in case the said attorney was present then he should have been able to give details of the

notes with which the said amount was paid to the accused and since the complainant was unable to give any details the presumption was rebutted. This was not even expected if the complainant himself was examined in person. It was certainly not necessary, for the complainant to have proved that he had advanced Rs.2,00,000/- as a loan to the accused but on the contrary it was for the accused to have proved that the cheques were issued without consideration and rebut the mandatory presumption available to the complainant that the cheque was given by way of repayment of the loan advanced by the complainant the onus of which was on the accused and the accused had miserably failed to discharge the said onus either by leading evidence of his own or from the evidence led on behalf of the complainant. It is also contended on behalf of the accused that the complainant's attorney was not present when the cheques were handed over to the complainant. That again was unnecessary, as it was for the accused to explain under what circumstances he had issued the said cheques. The accused having taken a plea that the cheques were misplaced by him and having failed to prove the same the only irresistible inference was that the cheques were given by the accused to the

complainant for the discharge of the loan taken by the accused from the complainant. It was certainly not necessary that the complainant's attorney should have been a witness who was present at the time when the said cheques were actually handed over by the accused to the complainant. In this context, reliance was placed on behalf of the accused particularly on Clause 4 of the Judgment in the case of **Mamta Devi, w/o Prafulla**(supra) wherein the Court had observed when the transactions are witnessed by the complainant and the power of attorney or any other witness or witnesses in the whole or in part, all such persons will have to be the witnesses of the case, to contend that the case of the complainant could not have been proved through the attorney alone and the complainant was also required to be examined. Reliance was also placed on the case of **Vidhyadhar v. Mankikrao and another**(AIR 1989 SC 1441). That was a case where the defendant had not stepped in the witness box to support his case and the Apex Court had concluded that adverse inference had to be drawn against the defendant. In my view, neither Clause 4 of the learned Judgment in the case of **Mamtadevi w/o Prafullakumar Bhansali v. Pushpadevi w/o Kailashkumar Agrawal and another**(supra) nor the said

Judgment of the Apex Court in the case of **Vidhyadhar v. Mankikrao and another**(supra) is of any assistance to the case of the accused. In the case at hand, all facts necessary for a successful prosecution were deposed to by the plaintiff's attorney including the fact that the loan was advanced by the complainant to the accused in his presence though otherwise that was not at all required to be proved by the complainant in the light of Section 139 of the Act. It was for the accused to prove as to how the cheque of the accused and signed by the accused had landed into the hands of the complainant. As already stated, the plea taken by the accused that he had misplaced the cheques was not proved by the accused and the only inference was that the said cheques were given by the accused towards the repayment of the said sum of Rs.2,00,000/- which was advanced by the complainant to the accused. Another submission made on behalf of the accused is that the amount advanced by the complainant to the accused was payable within six months and therefore the subject cheques could not have been issued either on 4-11-2002 or 5-11-2002. Admittedly, the subject cheques were given by the accused to the complainant. It was not the case of the accused that they were written by the

complainant and in fact the complainant's attorney had categorically stated that the handwriting on the said cheques was not that of the complainant and in such a situation it was for the accused to have explained as to in whose handwriting the said cheques were written. The sum of Rs.2,00,000/- was advanced on 1-6-2002 as stated by the complainant as well as the complainant's attorney. The cheques were issued on 4-11-2002 and 5-11-2002. The complainant did state in his sworn statement that the accused had failed to make the payment within the period of six months. The complainant's attorney also stated in his deposition that the cheques in question were handed over after the expiry of six months from the payment of the said amount and this statement would suggest that the cheques were issued after 1-12-2002. It has been conceded on behalf of the complainant, that the said statement is certainly a mistake made by the complainant's attorney. In my view, the said mistake is insufficient to rebut the said presumption which is available to the complainant that the subject cheques were issued by the accused towards the repayment of the loan of Rs.2,00,000/- advanced by the complainant on 1-6-2002 to the accused. Here, it may be noted

that it was the consistent case of the complainant himself whether in the complaint or in the sworn statement that the amount lent was returnable within six months and it is only the solitary statement of the complainant's attorney which shows that the cheques were issued after the expiry of six months. That statement is not sufficient to rebut the case of the complainant. In this case, the accused having failed to discharge the onus that the cheques were issued by the accused without consideration, the learned C.J.M. ought to have concluded that the presumption itself tantamounted to proof. Considering the facts and circumstances of the case, the accused had failed to discharge the onus which was on the accused in terms of Section 139 of the Act to prove that the said cheques were issued by the accused without consideration. The learned C.J.M. ought to have held that the complainant had proved his case and convicted the accused.

17. A submission has also been made on behalf of the accused that the complainant was required to produce the required documents when the complainant led the evidence. In this context, it may be stated that the required documents were

produced before the Court at the time when the sworn statement in presence of the complainant was recorded and marked as Exhibits. The complainant's attorney at the time of the trial only referred to the said documents and stated that the complainant had already produced the said documents. It has been submitted on behalf of the accused that since the complainant did not produce the said documents in the trial, the said documents could not be looked into by the learned C.J.M. On the other hand, it is submitted on behalf of the complainant that the documents were already produced previously and were referred to by the complainant in his evidence and were otherwise available on record and the complainant had ample opportunity to cross-examine the complainant with reference to the said documents. Firstly, it may be observed that on behalf of the accused no objection was taken when the complainant's attorney was examined in the trial against the accused. The documents were already produced by the complainant and were exhibited and referred to by the complainant in his examination-in-chief/affidavit. The accused had ample opportunity to cross-examine the complainant with reference to the said documents. In a situation like this, the accused cannot now be heard to

complain that the complainant did not produce the said documents at the trial.

18. In the light of the above, the appeal succeeds, the Judgment of the learned C.J.M. is hereby set aside and the accused is hereby convicted under Section 138 of the Act. The learned Counsel on behalf of both the parties have been heard on the point of sentence. As far as substantive sentence is concerned both the learned Counsel have left the matter to the discretion of this Court. As regards the aspect of compensation, the learned Counsel on behalf of the complainant has submitted that in the case of **Goa Plast(P) Ltd. v. Chico Ursula** (supra) the Apex Court was pleased to order the payment of compensation of Rs.80,000/- which was double of the amount of the cheque that is to say of Rs.40,000/-. The learned Counsel on behalf of the complainant therefore submits that in this case this Court may direct the accused to pay compensation of Rs.4,00,000/- being double the amount of the cheques.

19. Considering the facts of the case, in my view, ends of justice will be met by making the following order:-

"The accused is hereby sentenced under Section 138 of the Act to undergo S.I. for fifteen days. The accused is also directed to pay to the complainant compensation of Rs.2,75,000/- in default to undergo S.I. for one year".

20. The accused to surrender before the learned C.J.M. to undergo the sentence within a period of four weeks.

N. A. BRITTO, J.

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